

17  
DISTRIBUTED  
SEP 16 1987

ORIGINAL

NAL

No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Supreme Court U.S.  
FILED  
SEP 11 1987  
JOSEPH F. SPANIOLO JR.  
CLERK

FRANK DEAN TEAGUE,

Petitioner,

V.

MICHAEL LANE, Director, Department of Corrections, and  
MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. PELLETIER  
Acting Deputy Defender

PATRICIA UNSINN\*  
Assistant Appellate Defender  
Office of the State Appellate Defender  
State of Illinois Center  
100 W. Randolph Street  
Suite 5-500  
Chicago, Illinois 60601  
(312) 917-5472

COUNSEL FOR PETITIONER

\*Counsel of Record

TABLE OF AUTHORITIES

	Page
<u>Allen v. Hardy</u> , 106 S.Ct. 2878 (1986).....	2
<u>Ballew v. Georgia</u> , 435 U.S. 223 (1978).....	2
<u>Batson v. Kentucky</u> , 106 S.Ct. 1712 (1986).....	2,3
<u>Garrett v. Morris</u> , 815 F.2d 509 (8th Cir. 1987).....	3
<u>Griffith v. Kentucky</u> , 107 S.Ct. 708 (1987).....	2
<u>Lockhart v. McCree</u> , 106 S.Ct. 1758 (1986).....	1
<u>McCray v. New York</u> , 461 U.S. 961 (1983).....	2
<u>Swain v. Alabama</u> , 380 U.S. 202 (1965).....	3
<u>Taylor v. Louisiana</u> , 419 U.S. 522 (1975).....	1
<u>Weathersby v. Morris</u> , 708 F.2d 1493 (9th Cir. 1983).....	3
<u>Ulster County Court v. Allen</u> , 442 U.S. 140 (1979).....	3

No. 87-5259  
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

---

FRANK DEAN TEAGUE,

Petitioner,

V.

MICHAEL LANE, Director, Department of Corrections, and  
MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

---

REPLY TO BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

---

REASONS FOR GRANTING WRIT

Petitioner responds as follows to the arguments of Respondents:

WHETHER THE SIXTH AMENDMENT FAIR CROSS-SECTION  
REQUIREMENT EXTENDS TO THE PETIT JURY SO AS TO  
BAR THE RACIALLY DISCRIMINATORY USE OF THE PER-  
EMPTORY CHALLENGE IS A RECURRING QUESTION ON WHICH  
THIS COURT EXPRESSED NO VIEW IN BATSON BUT WHICH  
REMAINS CONTROVERSIAL, RESULTING IN CONFLICTING  
DECISIONS FROM BOTH STATE AND FEDERAL COURTS,  
THUS MERITING THIS COURT'S REVIEW.

Respondents urge that this Court need not examine this issue  
because in both Taylor v. Louisiana, 419 U.S. 522 (1975) and  
Lockhart v. McCree, 106 S.Ct. 1758 (1986) it rejected the notion  
that the Sixth Amendment requires that a jury reflect the  
composition of the community. There are two defects to this  
argument. First, regardless of this merit of the argument,  
courts of appeal have reached conflicting decisions as to this  
contention, and the existence of these diverging opinions alone  
demands that this Court grant certiorari to resolve the conflict.  
Second, Petitioner has never demanded that the jury which decides  
his guilt or innocence mirror the community, only that the  
prosecution be barred from exercising its challenges so as to  
preclude the possibility of obtaining a representative jury.

This Court has interpreted the Sixth Amendment to guarantee the  
fair possibility of a representative jury, Ballew v. Georgia, 435  
U.S. 223 (1978), and Petitioner has contended only that a  
prosecution's racially discriminatory use of the peremptory  
challenge interferes with the possibility that the jury will  
reflect a fair cross section of the community. Therefore, this  
Court has not yet expressly rejected Petitioner's argument on its  
merits.

BATSON SHOULD BE APPLIED RETROACTIVELY TO ALL  
CONVICTIONS NOT FINAL AT THE TIME CERTIORARI  
WAS DENIED IN McCray v. New York IN ORDER TO  
CORRECT THE INEQUITY AND CONFUSION WHICH RE-  
SULTED WHEN THIS COURT, WHILE SIGNALING THAT  
SWAIN WAS NO LONGER DISPOSITIVE, INTENTION-  
ALLY DELAYED A DECISION ON THE ISSUE RESOLVED  
BY BATSON.

The flaw in Respondents' argument that Allen v. Hardy, 106 S.Ct.  
2878 (1986) controls the resolution of the question of the  
retroactivity of Batson v. Kentucky, 106 S.Ct. 1712 (1986) to  
this case is that the direct appeal in Allen v. Hardy was final  
at the time this Court denied certiorari in McCray v. New York,  
461 U.S. 961 (1983). Therefore this Court was not faced with the  
issue presented herein when it decided Allen v. Hardy. Granting  
certiorari in this case would allow this Court to finally  
conclude its rethinking of the law of retroactivity, a desire  
expressed by the two members of the Court in separate opinions in  
Griffith v. Kentucky, 107 S.Ct. 708 (1987) (Powell, J.,  
concurring, and Rehnquist, C.J., dissenting).

THE DIRECT CONFLICT BETWEEN THE DECISIONS OF  
THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS  
AND THE SEVENTH CIRCUIT COURT OF APPEALS RE-  
GARDING WHETHER AN EQUAL PROTECTION VIOLATION  
MAY BE PROVEN PURSUANT TO SWAIN V. ALABAMA  
OTHER THAN BY PROOF OF A SYSTEMATIC EXCLUSION

OF BLACK JURORS BY PEREMPTORY CHALLENGE IN  
CASE AFTER CASE, A QUESTION LEFT OPEN BY  
SWAIN, SHOULD BE RESOLVED BY THIS COURT.

Respondents assert Petitioner has made no claim cognizable pursuant to Swain v. Alabama, 380 U.S. 202 (1965) because he has not alleged the prosecution "engaged in the systematic exclusion of blacks from petit juries in case after case." (Response, p. 6) Respondents mistakenly assume a Swain violation may be established only by a showing of invariable exclusion of black jurors in more than one case, an assumption for which it offers no support of authority. The Swain opinion contains no such limitation, as the author of that opinion recognized, Batson v. Kentucky, 106 S.Ct. 1712, 1725 n.\* (White, J., concurring), and the Ninth and Eighth Circuit Courts of Appeals have so held. Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987). The fact that the Swain argument was not raised in the state court does not bar relief for Petitioner since Respondents do not deny that the state courts denied Petitioner relief on the ground that Swain controlled, thus rejecting the claim on its merits. Ulster County Court v. Allen, 442 U.S. 140 (1979).

Respectfully submitted,

MICHAEL J. PELLETIER  
Acting Deputy Defender

PATRICIA UNSINN\*  
Assistant Appellate Defender  
Office of the State Appellate Defender  
State of Illinois Center  
100 W. Randolph Street  
Suite 5-500  
Chicago, Illinois 60601  
(312) 917-5472

COUNSEL FOR PETITIONER

\* Counsel of Record